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No. 03-1230

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC. and
USF HOLLAND, INC.
Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *ET AL.*
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Michigan

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
STEPHANIE A. MARTZ
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CHRISTOPHER J. WRIGHT *
TIMOTHY J. SIMEONE
HARRIS, WILTSHIRE &
GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730-1300

* *Counsel of Record*

MOTION FOR LEAVE TO FILE

The Chamber of Commerce of the United States of America ("the Chamber") hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Consent to the filing of this brief has been obtained from counsel for the petitioners. Counsel for respondents has refused consent.

The Chamber is the world's largest business federation. It represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy and in every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus* briefs in cases involving issues of national concern to American business. The Chamber has participated as *amicus curiae* in several hundred cases before this Court.

The Chamber and its members have a strong interest in this case because the decision of the Michigan Court of Appeals is fundamentally inconsistent with the core constitutional principle of free trade among the States as elaborated in the decisions of this Court. Specifically, the lower court improperly upheld an unapportioned flat tax that is plainly inconsistent with the "internal consistency" standard applied by this Court. To survive such scrutiny, "a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *American Trucking Association, Inc. v. Scheiner*, 483 U.S. 266, 284 (1987) (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)).

The court below declined even to address "internal consistency" on the ground that the Michigan assessment at issue is a "regulatory fee" rather than a "tax." As set forth in the accompanying brief, however, that distinction has no

place in Commerce Clause jurisprudence. The lower court's approach, if adopted more broadly, would re-open an entire area of Commerce Clause jurisprudence long thought settled by *Scheiner*.

Moreover, permitting state courts to elevate form over substance, as in the decision below, poses a distinct danger of state manipulation of the Commerce Clause's requirements. The Michigan court's decision provides state courts a roadmap for evading the Commerce Clause's guarantee of free trade by merely adjusting the line between "fees" and "taxes." Similarly, the lower court's approach would permit state legislators and regulators to erect barriers to trade by ensuring that protectionist measures have characteristics traditionally associated with "fees," including: 1) limited application to specific kinds of businesses subject to regulation by a particular agency and 2) targeted use of funds for specific regulatory expenses.

In short, *amicus* has grave concerns about the implications of the lower court decision, and a great interest in securing expeditious review. This motion for leave to file the attached brief should be granted and the Court should reverse the lower court decision.

Respectfully submitted,

ROBIN S. CONRAD
STEPHANIE A. MARTZ
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CHRISTOPHER J. WRIGHT
TIMOTHY J. SIMEONE
HARRIS, WILTSHIRE &
GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730-1300

QUESTION PRESENTED

Michigan imposes an annual tax on motor carriers of $100 per vehicle for the privilege of transporting property between points within the State. Though accepting that it "may be" that interstate motor carriers wishing to make such intrastate hauls "invariably will pay a higher per mile fee than the carrier who operates solely intrastate," the Michigan Court of Appeals upheld the tax over petitioners' Commerce Clause challenge. Deepening a split among state courts of last resort, the Michigan Court of Appeals reasoned that (i) this Court's "fair apportionment" requirement does not apply to taxes that are used to fund regulatory activity and (ii) petitioners could not rely on the discriminatory nature of the tax and instead were required to adduce evidence that particular trucking companies' "route choices are affected by imposition of the fee." Against this background, the question presented is:

Whether an unapportioned flat tax like Michigan's can be spared from invalidation under the Commerce Clause on the ground that it is used to pay for regulatory activities and/or because the taxpayer did not adduce evidence quantifying the discriminatory effect of the tax on interstate commerce.

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy and in every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus* briefs in cases involving issues of national concern to American business. The Chamber has participated as *amicus curiae* in several hundred cases before this Court.[1]

The Chamber and its members have a strong interest in this case because the decision of the Michigan Court of Appeals is fundamentally inconsistent with the core constitutional principle of free trade among the States. The federal Constitution was drafted to replace the Articles of Confederation largely to advance that principle, and it is critical to the conduct of American business that the United States remain a free trade zone. As this Court has emphasized, the Commerce Clause "was framed upon the

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[1] Pursuant to Sup. Ct. R. 37.6, the *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus*, its members, and its counsel, contributed monetarily to the preparation or submission of this brief. Counsel for petitioners has consented to the filing of this brief. Because counsel for respondents has refused consent, this brief is accompanied by a motion of *amicus* seeking leave to file.

theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. Seelig*, 294 U.S. 511, 523 (1935).

Facially discriminatory tax burdens – those imposed on interstate but not intrastate commerce – are, of course, unconstitutional. But this Court has recognized that free trade among the States may also be undermined by state laws that "do not allocate tax burdens . . . in a manner that is facially discriminatory." *American Trucking Association, Inc. v. Scheiner*, 483 U.S. 266, 281 (1987). The Court has therefore insisted on "internal consistency" – "a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Id.* at 284 (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)).

The court below characterized the Michigan assessment at issue as a "regulatory fee" rather than a "tax," and refused to apply the "internal consistency" standard. But constitutional principles do not turn on formalistic matters of characterization – whether denominated a "fee" or a "tax," a state levy may burden interstate commerce just the same. Because the lower court decision circumvents this Court's Commerce Clause jurisprudence and sets forth a roadmap for other courts to do the same – raising the specter of balkanization not only in the trucking industry, but throughout the national economy – the Chamber urges grant of the Petition and reversal.

STATEMENT OF THE CASE

This case involves a $100 fee imposed by Michigan on motor carriers transporting property within the State. *See* Michigan Compiled Laws § 478.2(1). The Michigan fee is functionally equivalent to the $36 per axle tax invalidated by

this Court in *Scheiner*. As here, the *Scheiner* tax was facially neutral, applying both to vehicles registered in Pennsylvania and to vehicles registered in other states.

In *Scheiner*, this Court struck down the axle tax, applying the "internal consistency" standard developed in previous Commerce Clause cases from the requirements that state assessments be "fairly apportioned" and "not discriminate against interstate commerce."[2] 483 U.S. at 277. The Court reasoned that the axle tax was not "internally consistent" because "[i]f each state imposed" such a tax, "there is no conceivable doubt that commerce among the States would be deterred." *Id.* at 284. Indeed, while a five-axle truck operating only in Pennsylvania would have paid only one $180 fee, a truck operating in 10 states would have incurred $1,800 in liability if other states enacted the same tax. The Court therefore concluded that "the axle tax has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the States that enacted the measure rather than 'among the several States.'" *Id.* at 286-87.

Below, the Michigan appellate court declined to apply the "internal consistency" test at all. Applying state law principles, the lower court found that the $100 assessment was not a tax, but a "regulatory fee," because "it is a fee imposed for the administration of the MCA [the Michigan Carrier Act], particularly covering costs of enforcing safety regulations." Pet. App. 15a. The lower court held that conclusion dispositive of the federal Commerce Clause issue. In a terse footnote, the court ruled that the internal

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[2] The *Scheiner* Court also invalidated a $25 "marker fee" applicable to out-of-state vehicles, which in-state vehicles were "deemed" to pay through their Pennsylvania registration fee. *See* 483 U.S. at 281-86.

consistency test did not apply because it "is used to analyze the constitutionality of state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, . . . not regulatory statutes." *Id.* at 29a n.16. The court proceeded to apply the more lenient "balancing" test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which pertains to regulations rather than assessments. The court concluded: "[W]e cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways." Pet. App. 31a.

SUMMARY OF ARGUMENT

This case presents an issue of great importance to American business because the decision below unsettles a central precept of dormant Commerce Clause jurisprudence, and in a way that cannot be confined to the circumstances of this case. It is black-letter law that state taxes must be "internally consistent," such that "'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Scheiner*, 483 U.S. at 284 (quoting *Armco*, 467 U.S. at 644)). The lower court circumvented that rule by holding the Michigan assessment at issue to be a "regulatory fee" rather than a "tax." That distinction has no place in Commerce Clause jurisprudence: the burden on interstate commerce does not depend on whether an assessment is a "fee" or a "tax," and there is accordingly no sound basis for applying the internal consistency test only to the latter. If other courts were to adopt the Michigan court's approach, it would lead to nullification of several of this Court's recent dormant Commerce Clause decisions involving motor carriers, as well as decisions dating back many years involving other forms of interstate commerce. The decision below thus threatens not only the trucking industry, but other participants in interstate commerce as well.

In short, the lower court decision appears to flout this Court's *Scheiner* standard by interjecting an irrelevant precondition to its application. Because widespread adoption of that approach would re-open an area of currently settled law, this Court should grant the Petition and reverse the decision below.

REASONS FOR GRANTING THE PETITION

1. Review by this court is warranted because the Michigan court's decision imports an irrelevant and potentially dangerous distinction between "taxes" and "regulatory fees" into the presently straightforward application of the "internal consistency" test. The lower court opinion thereby circumvents – and provides other courts, legislators, and regulators a means to circumvent – the clear rule of *Scheiner*. This Court should not permit that result, but should instead make clear that the internal consistency test applies to "regulatory fees" as well as to "taxes."

The court below concluded, under Michigan law, that "[i]f a fee's purpose is to regulate an industry or service, it can be properly classified as a regulatory fee" rather than a tax. Pet. App. 15a. The Chamber has no quarrel with that conclusion as a matter of Michigan law, and the fee/tax distinction may sometimes be relevant, such as when statutory language or purpose makes the use to which revenue is put determinative.[3] In such circumstances, the courts have explained that "[t]he classic 'regulatory fee' is imposed by an agency upon those subject to its regulation." *San Juan Cellular Telephone Co. v. Public Service Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992) (Breyer, C.J.). It may serve "regulatory purposes directly by, for

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[3] *See, e.g.*, Pet. 15 n.9.

example, deliberately discouraging particular conduct by making it more expensive" or "indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses." *Id.* The classic "tax," by contrast, "is imposed by the legislature upon many, or all, citizens," and "raises money, contributed to a general fund, and spent for the benefit of the entire community." *Id.*

The Chamber submits, however, that this question of classification has never been relevant under the Commerce Clause, and for good reason. First, in practice, the line between "regulatory fees" and "taxes" is far from clear, and has been criticized as analytically unsatisfying. *See generally* Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 Gonz. L. Rev. 335 (2003); Major Cotell and Lieutenant Colonel Jaynes, *Regulatory Fees . . . Or Taxes: Sorting Out The Difference*, 1999 Army Law. 32. Enforcement of the Constitution's guarantee of a free trade zone among the several States should not be made to turn on this uncertain distinction.

More importantly, as the *Scheiner* Court implicitly recognized, whether a particular assessment unduly interferes with interstate commerce has nothing to do with whether it is a "tax" or a "fee." The levy at issue in *Scheiner* certainly had some characteristics of a "fee" – it was, for example, imposed only on truckers, rather than "upon many, or all citizens," and the Court suggested that Pennsylvania may have used the money to defray costs of road repair necessitated by truck traffic. *See Scheiner*, 483 U.S. at 270-71. But the Court ascribed no significance to classification of the assessment, and wasted no time debating it. Instead, the Court applied the "internal consistency test" and held that the levy impermissibly burdened interstate commerce. *See id.* at 286-87. In short, under the *Scheiner* analysis, the axle tax would have offended the Commerce Clause equally

whether it was a tax or a fee. The same is true of the $100 Michigan assessment at issue here.

Academic commentary reinforces the point that whether a state assessment unduly interferes with interstate commerce has nothing to do with whether it is a "tax" or a "fee." "From an economic standpoint," "fees[] and taxes are analytically the same." Jerry Hausman and Howard Shelanski, *Economic Welfare And Telecommunications Regulation: The E-Rate Policy For Universal-Service Subsidies*, 16 Yale J. Reg. 19, 22 n. 59 (1999). Certainly that is true for Commerce Clause purposes under the internal consistency test. As Professor Hellerstein has noted, "the evils that the 'internal consistency' test was designed to combat are the same regardless of whether the unapportioned flat levy is an exercise of the tax power or the regulatory power," and there is therefore no "sound policy basis for distinguishing the 'fee' from the 'tax' cases." Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 157 (1988).[4]

As Professor Hellerstein suggests, it is the failure to satisfy the apportionment requirement – and not the label "tax" or "fee" – that results in a Commerce Clause violation. Indeed, the label applied to an assessment is entirely irrelevant; as a practical matter, an unapportioned levy on motor carriers "penalize[s] some travel within the free trade area" regardless of what it is called. *Scheiner*, 483 U.S. at 284. The "inevitable effect is to threaten the free movement of commerce by placing a financial barrier" around the state imposing the assessment. *Id.* Accordingly, as this Court has held, "any threat of malapportionment" must be assessed by

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[4] *See* Pet. at 10, 14-15 for more detailed discussion of Professor Hellerstein's views.

applying the internal consistency standard. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). The court below avoided that obligation merely by labeling the $100 levy a "fee."

Clearly, permitting state courts to elevate form over substance, as in the decision below, poses a distinct danger of manipulation of the Commerce Clause's requirements. First, state high courts inclined to uphold state money-raising measures (whether "taxes" or "fees") could simply adjust the line between those categories to expand that of "fees" and correspondingly contract that of "taxes." As noted above, the Michigan court addressed the question of classification as a matter of state law, *see* Pet. App. 14a-15a – an approach that would, if generally applied, maximize state courts' ability to determine outcomes under the federal Commerce Clause by re-categorizing assessments as "fees." Second, allowing categorization to control would permit state legislatures and agencies to convert "taxes" to "fees" merely by 1) limiting their application to specific kinds of businesses subject to regulation by a particular agency and 2) using the proceeds to fund specific regulatory expenses. This Court should grant certiorari review now to eliminate the potential for such sleight-of-hand by state courts and lawmakers.

2. Significantly, the decision below would not only nullify *Scheiner* and related decisions of this Court involving motor carriers, but would also eviscerate decades of precedent regarding other areas of interstate commerce. Indeed, as early as 1887, this Court's decision in *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887), adopted an approach to Commerce Clause review of state and local assessments fundamentally inconsistent with the formalistic analysis of the court below. *Robbins* concerned a Tennessee statute authorizing a tax of $10 per week on "drummers" – traveling sales merchants who displayed their goods and took

orders – operating in Shelby County. The County defended the tax on the ground that "no discrimination is made between domestic and foreign drummers – those of Tennessee and those of other states; they are all taxed alike." *Id.* at 497. But unlike the Michigan court below, which upheld the $100 assessment because it "regulates evenhandedly," Pet. App. 29a, this Court struck down the drummer tax.

The *Robbins* Court noted that it was well-established "in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems." 120 U.S. at 494. "The doctrine of freedom of commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject." *Id.* Moreover, in a discussion similar to those in recent decisions establishing the internal consistency requirement, the Court stated that, despite the challenged assessment's facial neutrality, "[i]t would not be difficult . . . to show that . . . [it] is discriminative against the merchants and manufacturers of other states."[5] *Id.* at 498. The Court explained that while local merchants did not need to hire sales agents, merchants from other states "can only sell their goods in Memphis by the employment of drummers." *Id.*

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[5] The same is true here – as the Petition correctly argues, quite apart from the lower court's flat refusal to apply the internal consistency test mandated by this Court's precedents, "the Michigan court erred in failing to recognize the discriminatory nature of the Michigan tax." Pet. at 20. This Court has made clear that unapportioned "flat taxes *necessarily* discriminate against interstate interests." *Id.* at 21. Indeed, in this case, it is undeniable that the Michigan tax imposes a greater per-mile financial burden on trucking companies operating interstate than on those operating solely within Michigan. *See id.* at 22.

As in *Scheiner*, the *Robbins* Court did not discuss whether the Tennessee assessment was a "regulatory fee" or a "tax," although it obviously had some characteristics – such as its narrow application – of a fee. As in *Scheiner* (and as here), if that distinction were important, the assessment could easily have been modified to confer the characteristics of a "fee," for example by limiting its application to specific merchants and depositing the proceeds in a specific fund for some commerce-related purpose. But the effect on interstate commerce would have remained exactly the same. The *Robbins* Court, like *Scheiner*, therefore struck down the assessment without wasting time on questions of categorization.

If the lower court decision according dispositive weight to the fee/tax distinction is allowed to stand, cases as old as *Robbins* will be called into question. Moreover, *Robbins* illustrates that this danger is not limited to the trucking industry alone. Nearly *any* activity – even "drumming" – may be subject to a levy susceptible to characterization as a "regulatory fee." Allowing that denomination to control would, as a practical matter, enable state legislatures and agencies to re-open long-settled law, applicable across industries, by merely adjusting the administrative details of assessment schemes to confer the characteristics of "regulatory fees" rather than "taxes."

Decided one hundred years after *Robbins*, *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), further illustrates this danger. *Tyler Pipe* did not involve a particular industry, but rather a state business and occupations tax that applied to *all* wholesaling within the state of Washington. Although that levy applied equally to both out-of-state and local manufacturers – and thus "appear[ed] nondiscriminatory," *id.* at 248 – the Court nonetheless applied the "internal consistency" test to

invalidate the assessment. The Court pointed out that while the *wholesaling* levy was nondiscriminatory, the state assessment scheme also relieved local manufacturers from paying a *manufacturing* tax on output subject to the wholesale tax. *See id.* at 240. If all states were to apply a similar scheme, the Court concluded, it would be more advantageous to manufacture and sell goods within a state (where only one tax would apply) than to manufacture goods in one state and sell them in others (where a "multiple burden" would result). *See id.* at 247. Interstate commerce would thus be burdened.

That burden would not change were either tax to be restructured as a regulatory fee. The Commerce Clause would be no less offended if, for example, the manufacturing tax scheme were altered so that its proceeds were placed in a special fund and used exclusively to retrain blue-collar workers displaced by global competition. What matters under the Commerce Clause is whether in-state manufacturers are relieved of paying the assessment for the portion of their output subject to the wholesale tax, not the label of the assessment, or the use to which funds are put. Courts applying the Michigan appellate court's approach, however – that the internal consistency test does not apply to regulatory fees – would reach a different result. Again, the lower court decision thus re-opens long-settled issues that potentially affect not merely trucking, but essentially every industry.

The Chamber does not intend to suggest that all state assessments fail the internal consistency test. For example, as this Court explained in *Scheiner*, fuel consumption taxes are directly apportioned to the miles traveled in a particular state, and therefore permissible under the Commerce Clause. *See* 483 U.S. at 283. Other sorts of user fees that would not burden interstate commerce even if applied by all States –

such as the $1 charge for airline passengers at issue in *Evansville-Vanderbaurgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), which was a reasonable approximation of the cost of using the facilities – are likewise permissible. Hellerstein, 87 Mich. L. Rev. at 157-58. But the $100 assessment at issue in this case is not; because Michigan's levy is entirely unapportioned, its burden plainly falls more heavily on carriers operating both intra- and interstate than on those operating only within the state. That places the former at a distinct disadvantage in the Michigan market. Moreover, if other states were to impose such a levy, interstate carriers would be further disadvantaged. Accordingly, Michigan's assessment – like the axle levy invalidated in *Scheiner* – fails the internal consistency test and impermissibly burdens interstate commerce regardless of whether it is called a tax or a fee.

3. The question presented by the Petition is one of particular importance to American business, and one that needs to be addressed without delay. Legal and regulatory certainty are, of course, key ingredients in the successful conduct of business of all kinds. The lower court decision injects uncertainty into an area of law that has been well-settled at least since *Scheiner*. Renewed uncertainty, of course, means renewed litigation. *See* Pet. 26. And the results of that litigation are themselves unpredictable – state courts anxious to uphold state enactments may well adopt the Michigan court's formalistic approach and uphold assessments that impose unlawful burdens on interstate commerce. Both the litigation itself and any adverse decisions that may result will be costly to American business.

For the legal system, renewed uncertainty means inconsistent decisions. Here, as the Petition points out, "inconsistency in the approaches of the lower courts" has already arisen. *Id.* at 20. Several state supreme courts have

properly applied the internal consistency test to invalidate assessments classifiable as "regulatory fees," while the decision below represents a second instance of state courts declining to do so. *Id.* at 20-22. This Court should grant review to eliminate the uncertainty amplified by the decision below.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

ROBIN S. CONRAD
STEPHANIE A. MARTZ
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CHRISTOPHER J. WRIGHT *
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(202) 730-1300

* *Counsel of Record*